United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1172

To be argued by
Lawrence Milberg.

United States Court of Appeals

For the Second Circuit.

LILLIAN STULL,

Plaintiff,

v.

NORMAN J. GREENE, WALTER C. JAMOUNEAU, CHARLES W. POOL, R. K. GRIFFIN, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., WILLIAM T. PIPER, GRUMMAN AIRCRAFT ENGINEERING CORPORATION and CRIS-CRAFT INDUSTRIES, INC., and PIPER AIRCRAFT CORPORATION,

Defendants.

LILLIAN STULL,

Plaintiff-Appellant,

v.

CHARLES W. POOL, WALTER C. JAMOUNEAU, R. K. GRIFFIN, NORMAN J. GREENE, HOWARD PIPER, THOMAS F. PIPER, WILLIAM T. PIPER, JR., and WILLIAM T. PIPER, JR., THOMAS F. PIPER and HOWARD PIPER, as Executors of the Estate of WILLIAM T. PIPER, Deceased, PIPER AIRCRAFT CORPORATION, and BENGOR PUNTA CORPORATION,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT.

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LILLIAN STULL,

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CHARLES W. POOL, et al.,

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On Appeal From the United States District Court

For the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

INTRODUCTION

This is an appeal from an order of the District Court for the Southern District of New York, (Richard Owen, District Judge) denying plaintiff's motion made under Rule 23(c)(1) of the Federal Rules of Civil Procedure and Rule 11A of the Civil Rules of the said District Court for an order determining that Stull v. Pool (72 Civ. 2055 (RO)), one of the above-captioned consolidated actions be maintained as a class action.

The decision below, reported in Fed. Sec. L. Rep. Curr. Dec. ¶94,533, was rendered on April 30, 1974, denied the motion on the ground that plaintiff and a partner in the firm of her attorneys were husband and wife, and members of the same "marital economic unit" and that this conflict rendered plaintiff an inappropriate representative of potential class members, and on the further ground that plaintiff rendered herself vunerable to "embarassing cross-examination" by reason of "contradictory statements" and "scathing assertions" made under oath in pleadings in Stull v. Greene, 69 Civ. 440 (198a)*.

Plaintiff thereupon substituted Milberg & Weiss as her attorneys and a motion for reconsideration, re-argument and rehearing or alternatively for certification

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* References are to pages of appendix filed by appellant.

of an interlocutory appeal was made. Because of delays in the hearing of the said motion, imposed apparently by the District Judge's calendar, plaintiff filed a Notice of Appeal from the order denying class determination (204a). Thereafter, the District Judge denied plaintiff's motion for reargument without prejudice on the ground that filing of a notice of appeal divested the lower court of jurisdiction to entertain such motion.

Questions Presented

1. Is the order of the Court below denying plaintiff's motion for class action determination appealable?

2. Did the Court below abuse its discretion by denying plaintiff's motion for class action determination on the ground that plaintiff's husband was a member of the firm of attorneys representing her?

3. Does the substitution of new attorneys for plaintiff after the decision of the Court below cure the alleged conflict of interest arising out of the husband/wife relationship?

4. Did the plaintiff make "scathing assertions" and "contradictory statements" in Stull v. Greene dealing with the tender offer price at issue in both litigations, which would have rendered her subject to "embarrassing cross-examination in Stull v. Pool and therefore render her an inadequate class representative?

5. If the Court takes jurisdiction and reverses, should it issue an advisory ruling contrary to the District Court's statement that it might not have granted class status because of the alleged conflict of interest between plaintiff's roles as class representative in Stull v. Pool and derivative plaintiff in Stull v. Greene?

Nature of the Actions

There are two actions pending before the Court which have been consolidated by order of District Judge Robert L. Carter, dated December 27, 1973, on the ground that there were questions of law and fact common to the two actions and that all of the plaintiff's claims arose out of the continuous fight between the management of the Piper Aircraft Corporation ("Piper") and Chris-Craft Industries, Inc., ("Chris-Craft") for control of Piper (52a).

History and Description of the Actions

Plaintiff Lillian Stull was and is a shareholder of Piper. The original complaint filed by her in Stull v. Greene, 69 Civ. 440, alleged that in 1969 Chris-Craft acquired a large number of shares of Piper and thereafter made a tender offer for 300,000 shares of Piper at $65.00 per share; that in order to perpetuate their control of Piper and defeat the Chris-Craft tender offer, the individual defendants ("Piper Management") agreed to issue stock to

Grumman Aircraft at $65.00 per share. This was for a value which the Piper Management had itself characterized as inadequate, all of which was alleged to be in violation of the Securities Exchange Act of 1934. (68a). In Stull v. Greene, Plaintiff moved on May 15, 1970 for leave to file a fourth amended and supplemental complaint. This complaint was filed on April 28, 1971, after Judge Lasker handed down his decision permitting such filing.

Between the filing of the original complaint and the fourth amended complaint, developments in the fight for control of Piper proliferated. Trying to keep pace with said developments, the plaintiff, over the period commencing February 3, 1965 through April 28, 1971 filed several derivative amended and supplemental complaints in Stull v. Greene (77a, 88a, 100a). Each of these complaints was based on the claimed inadequacy of the Chris-Craft offers which Chris-Craft twice increased as the fight for control continued.

During this period, the Piper management made an arrangement with Bangor Punta Corporation ("Bangor Punta") whereby Bangor Punta made an exchange offer to Piper public stockholders for a Bangor Punta package which defendants valued at $80. or more per share, while at the same time claiming that the Chris Craft offers were inadequate, as was a later $74. per share offer.

On December 22, 1971 District Judge Pollock handed down a decision in Chris-Craft v. Piper Aircraft Corp., 337 F Supp. 1128, (first published in the CCH Fed. Sec. L.Rep. issue of December 22, 1971, (para. 93, 301) in which he indicated (at 337 F.Supp. 1134) that at the time the Piper Management was making statements that the Chris-Craft offer was inadequate, it had in its possession a report from Piper's own investment banker advising that $65. a share was a fair price.

Judge Pollock decided that while Piper's public shareholders could have been misled into believing that the $65. per share offer was inadequate, there was no liability to Chris-Craft and dismissed the Chris-Craft complaint. This Court in Chris-Craft v. Bangor Punta Corporation, 480 F. 2d 341 (1973) held that Chris-Craft was entitled to damages and remanded.

After Judge Pollock's opinion spread on the record for the first time that Piper Management's statements of

inadequacy of the Chris-Craft offers were false and misleading, plaintiff filed Stull v. Pool on May 12, 1972 which alleged a class claim against Piper Management and Bangor Punta on behalf of shareholders of Piper who, like plaintiff, were misled by the Piper Management's announcements that the Chris-Craft offers were inadequate; had made an investment decision not to tender to Chris-Craft as a result thereof; and sustained damage when they (a) either continued to hold their shares of Piper, (b) tendered them to Bangor Punta for values lower than the Chris-Craft offers or (c) sold their shares thereafter at a loss.

Until Judge Pollock's decision revealed it, no public holder of Piper stock could know that the Piper Management had concealed the advice it received from its own investment adviser that the Chris-Craft offers were in fact fair and adequate.

The gravamen of Stull v. Pool was that the Piper Management misrepresented when they advised their shareholders that the Chris-Craft offers were inadequate and recommended Bangor Punta's package. Stull v. Pool necessarily had to contradict Stull v. Greene because the truth was now out. The factual basis which Piper Management cited in their machinations to defeat Chris-Craft's attempts to take control of Piper was exposed as being false and fraudulent, and this Court itself has declared such

concealments to be illegal and in violation of the Securities laws.

After the Stull v. Pool complaint was filed and after the en banc decision in Chris-Craft Industries, Inc. v. Bangor Punta and after certiorari was denied by the Supreme Court, the instant actions were consolidated. Plaintiff moved in Stull v. Pool for class determination. The class consisted of all those Piper shareholders who were deprived of the Chris-Craft tender offers by the wrongful acts and omissions of the defendants. This includes all Piper public shareholders who did not tender to Chris-Craft, who thereafter tendered to Bangor Punta or who continued to hold the shares and either sold them at a loss or whose shares now have lower values. All such shareholders are in the same boat as plaintiff. All were equally adversely affected by the misconduct complained of.

The decision below denied class status on the basis that the husband/wife relationship, and the alleged "contradictory statements" and "scathing assertions" made by plaintiff in Stull v. Greene that the value of Piper stock was worth at least $100. and the Chris-Craft offers were grossly and unconscionably inadequate rendered plaintiff an inadequate class representative. Judge Owen

indicated that he was not deciding the class motion except on these two grounds (203a).

We will demonstrate to the Court that Judge Owen's decision and order are appealable; that his ruling with respect to the "marital economic unit" was not correct; that even if it were correct, it has been cured by substitution of new counsel and that the Court should so declare at this stage of the litigation without further remand to Judge Owen; that the so-called contradictory allegations in Stull v Pool were the product of the new facts first announced to the public by Judge Pollock's decision in Chris-Craft v. Piper Aircraft Corp., 337 F. Supp. 1128; that there are in fact no real contradictions and that therefore plaintiff can adequately represent the class.

POINT I
THIS COURT HAS JURISDICTION TO ENTERTAIN AN APPEAL FROM A RULING DENYING CLASS ACTION DETERMINATION

In Eisen v. Carlisle & Jacquelin, (Sup. Ct.) 42 U.S.L. Week 4804 (1974), ("Eisen IV") the Supreme Court dealt with an argument that this Court had no jurisdiction

to review the District Court's order permitting Eisen III to proceed as a class action. The Supreme Court opted for the Eisen appellee's contention that

> "the orders in question constitute a 'final' decision within the meaning of 28 U.S.C. para.1291 and were therefore appealable as of right under that section" (Pages 11 and 12 of slip opinion in Eisen IV).

The Supreme Court also ruled that the issue of appealability from grant of a class motion was governed by the ruling in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and concluded that the principles stated in Cohen v. Beneficial Loan Corp. permitted review by this Court of a District Court's resolution of a class action notice problem.

The general principles announced by the Supreme Court in Eisen IV apply equally to denial of class status on the grounds relied by the District Court herein.

While Eisen IV had to do with this Court's right to entertain an appeal from class action determination granted on the basis of this Court's application of the "death knell" doctrine and the District Court's resolution of a notice problem, the instant cause presents no difference in principle.

Wholly aside from application of the "death knell" analysis,the issue of whether plaintiff is an adequate

class representative because she and her attorney are married, is completely collateral and unrelated to the merits of plaintiff's claims.

The Supreme Court stated that under Cohen v. Beneficial, supra:

> "...the requirement of finality is to be given a 'practical rather than a technical construction' Id. at 546."

The Supreme Court further stated with respect to Cohen;

> "This Court held the order appealable on two grounds. First, the District Court's finding was not 'tentative, informal, or incomplete', 337 U.S. at 546, but settled conclusively the corporation's claim that it was entitled by state law to require the shareholder to post security for costs. Second, the decision did not constitute merely a 'step toward final disposition of the merits of the case'. Ibid."

Discussing the notice requirement in Eisen III, (479 F.2d 1005), the Supreme Court in Eisen IV stated:

> "Moreover, it involved a collateral matter unrelated to the merits of petitioners' claims. Like the order in Cohen, the district court's judgment on the allocation of notice costs was 'a final disposition of a claim of right which is not an ingredient of the cause of action and does not require consideration with it', Id. at 546-47, and it was similarly appealable as a 'final decision' under para. 1291."

The ruling of the District Court herein that a husband and wife relationship between attorney and client renders the wife an inappropriate class representative,

equates precisely with each and every criterion in Cohen as defined in Eisen IV. It is completely collateral to the merits of plaintiff's cause of action which have been blazoned by this Court in Chris-Craft Industries, Inc. v. Bangor Punta Corp., 480 F.2d 341 (1973).

POINT II

THE "DEATH KNELL" DOCTRINE SHOULD BE APPLIED TO THE INSTANT CASE AND THE COURT SHOULD ENTERTAIN THE APPEAL

Plaintiff Lillian Stull owned 150 shares of Piper. The total issue of Piper stock amounted to approximately 1,644,790 shares. She therefore owned only a minuscule percentage of the shares outstanding.

The complaint alleges that she was deprived of the material information required to enable her to make an informed investment judgment as to whether to retain her Piper stock or tender it to Chris-Craft for what the Piper Management improperly characterized as "an inadequate" consideration, or tender it to Bangor Punta for the Bangor Punta exchange package which was ultimately found by this Court in Chris-Craft Industries v. Bangor Punta Corp., supra, to be a fraudulent consideration with considerably less than it was represented to be on the surface.

Plaintiff opted to retain her stock because of deliberate concealment of material facts by the Piper Management. She could have received $65. per share in cash from Chris-Craft. In June 1974 the range of Piper stock prices was 17 3/8 low and 17 7/8 high. In February 1972 after Judge Pollock's decision of December 1971 the range was 18 3/4 low to 25 7/8 high. The difference between $65. and $17 3/8 was approximately $48. per share, or in the area of $7200. leaving aside questions of general depressive market action.

The litigation involving the attempted takeover of Piper by Chris-Craft, the defensive maneuvers by the Piper management in their desperate attempts to perpetuate their position against what tney termed a "raid", and the Bangor Punta transaction, have now extended over a period of five years. Many firms of attorneys were involved and the facts developed in the trials and various appeals are voluminous. This Court itself is aware of the complicated factual and legal framework involved in this transaction, since it has had an opportunity to examine and pass upon the factual and legal issues involved. In Kohn v. Royall Koegel & Wells, (page 6, Slip Opinion No. 375, Docket No. 73-2049, decided May 3, 1974), this Court explained its reasoning in Eisen I.

> "It is undisputed that an order granting or denying class standing is not a 'final order' as such term has generally been construed. Nevertheless, in Eisen I, supra, we denied a motion to dismiss an appeal from an order denying class standing to a plaintiff whose individual claim amounted to only $70: the rationale for our decision rested on the deceptively simple premise that the effect of the order denying class standing would be to terminate that lawsuit. We could not conceive of a lawyer pressing a suit where victory would mean the paltry recovery of $70. Thus, we concluded in Eisen I that the 'interlocutory' order at issue was tantamount to an order of dismissal - - the finality of which has, of course, never been questioned - - and so the 'death knell' doctrine was born."

In the light of the complexity of the issues in the Piper Aircraft Corp., Chris-Craft Industries, Inc., Bangor Punta Corp. legal imbroglio, the same considerations apply. Restriction of this kind of suit to a maximum individual recovery of $7200. without the possibility of a fee based on a class recovery would discourage any attorney from being able to undertake an action of this kind. This would create a wide-open field for the kind of fraud, concealment, and intentional violation of the securities laws which this Court itself ruled that the Piper Management engaged in.

The reality is that continuation of this action after denial of class action determination would mandate presecution to final judgment, with the hope that after judgment the plaintiff would appeal to this Court to

reverse the denial of class status and remand the action for appropriate proceedings. Esplin v. Hirschi, 402 F. 2d 94 (10th Cir. 1967). This is the kind of situation promoting the one-way intervention which the framers of Rule 23 wanted to avoid. Committee Note of 1966 to Rule 23 as revised in 1966, 3B Moore's Federal Practice (2d ed.) p. 23-24. This Court should therefore take jurisdiction of this appeal.

POINT III

THIS COURT SHOULD ENTERTAIN CLASS ACTION APPEALS AS A MATTER OF PUBLIC-POLICY

Plaintiff's newly substituted law firm has been involved in class action litigation for many years. The writers of this brief have read innumerable class action decisions and tried to find common threads of logic and reasoning in those decisions. We suggest that the obstacles heretofore placed in the way of the appealability of class action determinations have led to a mass of contradictory rulings and textual commentary and unpredictable results, both at the District Court level in this Circuit, and the Circuit Court level nationally with no prospects of exit from this chaos unless immediate appellate review is accorded.

Class actions have been adjudicated by the Supreme Court of the United States to have socially "therapeutic value". Mills v. Electric Auto Lite Co. 369 U.S. 375 (1970). To enable them to retain their social value, appellate courts should take jurisdiction of appeals from orders granting or denying class action determinations, and thus hammer out a body of law which can be amenable to prediction by attorneys both for plaintiffs and defendants, who must now probe the mazes of the vast and multiplex body of jurisprudence presently existing.

We suggest that this would be the surest way to prevent a plethora of unjustified class actions from being brought. It would also curb the proliferation and multiplication of the time and energy now being devoted by attorneys and District Judges to class motions by announcing appellate doctrine to which District Courts can look for guidance.

In the instant case, review is sought because the District Court ruled that a wife whose husband is her attorney is not an adequate class representative because of a claimed identity of economic interest in the attorney's fees which may be generated by a successful termination of the class litigation - presumably by way of a settlement too early or too lenient on the defendants.

The ruling is based on an extension of certain cases which hold that an attorney may not himself act as class representative and attorney. None of these actions involved the federal securities laws and in each the plaintiff claimed only minimal damages personally (In Cotchett v. Avis, 56 F.R.D 549 (S.D.N.Y. 1972) a $1. surcharge was involved). Shields v. First National Bank, 56 F.R.D. 442 (D. Ariz 1972); Krieger v. European Health Spa., Inc., 56 F.R.D. 104 (E.D. Wisc. 1972); and Graybeal v. American Savings & Loan Assn. 59 F.R.D. 7 (D.D.C. 1973), where the Court stated at pp. 13-14:

> "...In any class action there is always the temptation for the attorney for the class to recommend settlement on terms less favorable to his clients because a large fee is part of the bargain. The impropriety of such a position is increased where, as here, the attorney is also the representative who brought the action on behalf of the class, and where, as here, the potential recoveries by individual members, including representatives of the class are likely to be very small in proportion to the total recovery by the class as a whole. Thus plaintiffs may stand to gain little as class representatives, but may gain very much as attorneys for the class."

This problem is inherent in any class action ---- attorneys apparently being considered by many courts as necessary evils who should become anchorites and opt out of a society based on money as a unit of exchange.

Other courts do not view the role of attorneys in this way, and there are cases where attorneys have been permitted to act as class representatives.

Grossman v. Playboy Clubs International, Inc., #882, 939, opinion of Jan. 12, 1969, Superior Court, L.A. Calif. (not off. rep.)

Kohn v. American Metal Climax, 313 F.Supp. 1251 (E.D. Pa. 1970)

Aronson v. Board of Trade, etc., CCH 1974 Trade Cases, par. 74953.

The Court below has now extended those rulings of various District Courts which prohibit an attorney from also being a class representative to create a doctrine which prohibits his wife from acting as such representative and retaining him as her attorney. Think about the refinements on this doctrine which may be suggested. Suppose the wife were an heiress or a well paid executive and that her income and/or assets far exceeded those of her husband? The possible variations are endless. For this Court to fail to exercise appellate jurisdiction over the ruling below

would leave class action jurisprudence and the law's most important element - predictability -to accidents of geography, forum shopping and individual District Judges' predilections in favor of or against class actions in general.

We suggested that Eisen IV has disposed of the argument that the principle in favor of finality should prevent necessary attention to collateral aspects of litigations which do not bear on the merits of the litigations themselves.

Judge Friendly in his concurring opinion in Korn v. Franchard, 443 F 2d 1301, 1307 (1971) wrote:

> "Since I regard Judge Feinberg's opinion as correctly applying the present law in this Circuit, I concur therein. However, despite the obvious appeal of the 'death knell' doctrine, I am not sure it affords a rule that is truly workable or, indeed, is legally sustainable. If my fears should be realized, I might wish on some subsequent occasion to request that the court consider en banc whether we are not obliged to formulate a rule that will avoid the necessity of making such ad hoc judgments as have been required in these and other cases and also will afford equality of treatment as between plaintiffs and defendants. Perhaps, before occasion for doing this should arise, we shall have received enlightenment from the Supreme Court." 443 F.2d 1301 at 1307.

As stated in the dissent by judge Rosenn in Hackett v. General Host Corp., 456 F. 2d 618, 630 (3rd Cir. 1972):

> "When the 1966 amendments to the Federal Rule were issued, the A.B.A. Special Committee on Federal Rules of Procedure stated that it hoped that there would be adequate appellate review of many of the questions surrounding the amendments to Rule 23 so that the contours of the amendment would be quickly shaped and clarified. 38 F.R.D. 95, 104 (1965)."

This imperative is highly desirable. The inconsistencies in the ruling of District Courts in many jurisdictions with respect to the role of attorneys and/or their families as class representatives should be put to rest. This Court should take jurisdiction of this appeal, if necessary by a ruling en banc.

POINT IV

THE RULING BELOW THAT PLAINTIFF IS IN CONFLICT OF INTEREST WITH THE CLASS IS NOT BASED ON EVIDENCE, CONFLICTS WITH PUBLIC POLICY AND IMPUTES IMPROPER MOTIVES OUT OF SHEER SUPPOSITION RATHER THAN FACT.

The issues of conflict of interest and consequent inadequacy of representation of the class by the plaintiff because her husband was a member of the law firm which acted as her counsel, were raised by the defendants whose conflicts of interest vis a vis the class are clearly more serious and far-reaching than any potential interest of the plaintiff. The rule of law is that there must be a conflict of interest as to the subject matter of a suit and that the plaintiff's interest in the subject matter

of the suit must not be antagonistic to that of the class. Popkin v. Wheelabrator-Frye, Inc., (S.D.N.Y. 1973) CCH Fed. Sec. L. Rep. par.90,491, page 94,372.

This plaintiff's interest is not antagonistic to the class merely because of the possibility that her husband, as attorney, might be interested in settling the action at an earlier stage and at greater financial advantage to the defendants rather than to proceed to final judgment against the defendants. Are the defendants who urge the conflict of interest really arguing that they would prefer an antagonist who would carry the action to its conclusion and permit no other ending to the action but a ruling in favor of the plaintiff and the class for the largest judgment possible? Wholly aside from the fact that this is contrary to the policy of law in favor of appropriate settlements, the argument itself is negated by the provisions of Rule 23(e) F.R.C.P. and the cases construing it which mandate extensive court supervision over the settlement of class actions and intensive court supervision over the fee structure in class actions.

The authorities noted by the Court below to support defendants' "marital unit" objections (200a-1, 201a) are not securities fraud cases; none involve an objection to plaintiff's being represented by her husband's law firm; they are largely District Court decisions of

other circuits; and they are in conflict with rulings by other judges of this and other courts. Even in cases where the attorney, himself, was the plaintiff, courts have permitted him to prosecute the action as a class action.

In Grossman v. Playboy Clubs International, Inc., #882, 939 Opinion of January 12, 1969, Superior Court, L.A. Calif., the attorney, himself, was the plaintiff; he pressed the case to conclusion and he was awarded a substantial fee. In Kohn v. American Metal Climax, 313 F.Supp. 1251 (E.D. Pa. 1970), the plaintiff was the Trustee of a pension trust for his law firm. He and other members of his firm were substantial beneficiaries of the pension trust. The action was permitted to proceed as a class action and the attorneys and his firm were awarded substantial fees. In Aronson v. Board of Trade, etc., CCH 1974 Trade CAses, Par. 74953, an attorney, himself, was one of the plaintiffs and was appointed one of the class representatives. He and other members of his law firm were awarded counsel fees.

In Kramer v. Scientific Control Corp., CCH Fed. Sec. L.Rep. Curr. Dec. para. 94449 (D.C.E.D. Pa. 1973) where the attorney was also the plaintiff the Court stated at page 95,557:

> "maintenance of a class action is not subject to valid criticism on the ground that it serves as a device to provide fees for attorneys, Dolgow v. Anderson 43 FRD 472 ED N.Y. 1968."

We respectfully suggest that the District Court's importation into its decision of the "marital unit" concept is contraindicated by society's constantly increasing recognition of the equal role of women and the ever greater legislative recognition of "women's rights". Refusal of a class determination on the ground that a wife cannot exercise independent judgment on behalf of a class she represents because her husband is a member of the firm of her attorneys would negate almost 100 years of history. (See also, New York Domestic Relations Law, §50 and New York General Obligation Law, Par. 3-301).

In Peskowitz v. Lawrence F. Kramer, Inc., 105 N.J.L. 415 where the defendant sought to impute the husband's contributory negligence to the wife, the Court stated at page 418:

> "...so far as the enforcement of her rights are concerned against third persons to redress wrong committed against her, she stands in the same relation to her husband as to a stranger."

There is also implicit in the instant decision an assumption that plaintiff will not proceed with this case to a final determination on the merits, an assumption which cannot now be made.

No claim of conflict has been raised by members of the class, who are alleged to have been damaged. The claim has been made by the alleged wrong-doers. It would be an unjust result if a meritorious cause of action were

to be denied its day in court because of an attack based on supposititious facts and attitudes in an attempt by alleged wrong-doers to escape their legal liabilities for their wrongs. The Court should further note that no other class member has come forward to assert these claims.* Disablement of this plaintiff to represent the class will result in no remedy for the class.

There has been no hint anywhere in this action that either the plaintiff or her husband-attorney had embarked or intended to embark on any fiduciary breaches vis a vis the class. In Halverson et al v. Convenient Food Mart Inc. 485 F.2d 927 (7th Cir. 1972), the court stated at page 932:

> "Only the most egregious misconduct on the part of plaintiffs' lawyer could ever arguably justify denial of class status. The ordinary remedy is disciplinary action against the lawyer and remedial notice to class members."

In that case there had been claims of actual misconduct. Here there have been none.

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*It is reasonable to assume that the average public investor does not read the CCH Federal Securities Law Reports or the Federal Supplemental Reports and thus would not have been made aware of Judge Pollock's comments in Chris-Craft Industries v. Piper Aircraft Corp., supra or of this Court's statement in Herbst v. ITT, Fed. Sec.L. Rep. Curr. Dec. para. 94,481 at page 95688 that: "...Chris-Craft claimed and we found, that letters sent by the Piper family which managed Piper Aircraft, to shareholders contained material misstatements and omissions..."

The ruling below should be reversed because no court should let stand even the hint that there may be the prospect of improper conduct by any member of the Bar where there has been no suggestion let alone not one iota of proof that there will be such misconduct. Korn v. Franchard Corporation, 456 F.2d 1206, 1208 (2d Cir. 1972).

POINT V

THE SUBSTITUTION OF NEW ATTORNEYS BY THE PLAINTIFF SHOULD REQUIRE REVERSAL OF THE DENIAL OF CLASS STATUS ON THAT BASIS ONLY

Plaintiff has substituted as her attorneys the firm of Milberg & Weiss who are experienced in this field (e.g. Drachman v. Harvey, 453 Fed. 2d 722 (2d Cir. 1972) and Feldman v. Hanley, 49 FRD 48, 51 (S.D.N.Y. 1969). In Korn v. Franchard Corporation, 456 F.2d 1206 (2d Cir. 1972) the District Court had withdrawn class suit status because of

> "conduct of the plaintiff's attorney who the Court thought had acted improperly in connection with the suit and would therefore not fairly and adequately protect the class interest." (456 F.2d at 1208).

New counsel was thereafter substituted.

On appeal this Court ruled that the substitution of attorneys cured the alleged inadequacy of representation

and that it would not go through the circuitous procedure of remanding with instructions to the lower court. One of the motivations of this Court was that

> "denial of class suit status will deprive not only Mrs. Korn of recovery but also the other investors in the same situation." (at page 1214).

POINT VI
THE RULING OF THE DISTRICT COURT THAT PLAINTIFF MADE "SCATHING ASSERTIONS" REGARDING THE VALUE OF PIPER STOCK AND MADE ALLEGATIONS IN STULL V. GREENE, INCONSISTENT WITH HER ALLEGATIONS AS TO THE VALUE OF PIPER STOCK IN STULL V. POOL, HAS NO BASIS IN FACT.

A. The "Scathing Assertions

The District Court in its opinion and decision has characterized Mrs. Stull's allegations in Stull v. Greene, that the Chris-Craft offers were "unconscionably" inadequate and that the value of Piper stock was well in cess of $100. per share as "scathing assertions". We assume that the Court had in mind a definition approximating that found in Webster's Collegiate Dictionary (5th Ed.) G&C Merriam Co.,Springfield, Mass. 1946, which defines "scathe" as "to assail with withering denunciation".

Paragraph 9 of the Amended and Supplemental complaint in Stull v. Greene, verified May 29, 1969 and filed April 28, 1971, alleges: .

"... that Piper, prior to the time of the acts and practices complained of, has traded on the NYSE at prices in excess of $70. per share; and the true value of its shares was and is in excess of $100. per share, as defendants know or should know."

Again at paragraph 53 of the same Amended and Supplemental complaint, it is alleged:

"53. At the time of the acts and practices complained of Piper shares were and are reasonably worth in excess of the amount which defendants Chris-Craft and Bangor Punta have offered or intend to offer Piper shareholders; that said Piper shares were and are reasonably worth in excess of $100. per share" (emphasis supplied).

We find similar statements in an affidavit of Lillian Stull sworn to March 10, 1970 opposing the Grumman Aircraft Corporation motion for summary judgment to dismiss her complaint as to Grumman on the basis that she had been a holder of the stock and not a purchaser and therefore had no standing.

Her statement reads as follows:

"8. Thereupon Piper shares which had been trading on the New York Stock Exchange at market prices of slightly less than $55. per share jumped to a little less than the Chris-Craft tender offer. Prior to that time however, Piper had traded on the New York Stock Exchange at prices in excess of $70. and I considered its worth and potential in a rapidly growing business (light commercial and private aircraft) to be conservatively in excess of $100. per share as did others."

It is hard to understand the characterization of any of the foregoing as "scathing assertions" or irresponsible statements.

Certainly the quotation from Mrs. Stull's affidavit of March 10, 1970 that she considered the "worth and potential" of Piper shares to be in excess of $100. is not a denunciation of anybody. That she also claimed that the Chris-Craft offers were "unconscionably inadequate" and that Piper stock was worth in excess of $100. per share betokens no more than advocate's zeal. A class plaintiff taking up the cudgels on behalf of other members of the class should certainly not be penalized for zeal.

The Piper Management itself had stated that the $65. price was inadequate. There is nothing inconsistent contradictory or conflicting in the allegations, considering the competition for the Piper stock and the statements of the Piper management - - all of which indicated to the public that there were underlying values far in excess of the prices offered.

B. The Alleged Contradictions

Up until the time that Judge Pollock first spread upon the record in Chris-Craft v. Piper Aircraft Corp., 337 F. Supp. 1128, (Decided December 22, 1971) that during the period that Piper Management was characterizing the Chris-Craft offers as "inadequate" it had in its possession an evaluation from First Boston Corporation that the $65.00 per share was a fair price, plaintiff, like all other public shareholders of Piper, was faced with a four handed poker

game involving Chris-Craft, Piper, Grumman Aircraft and Bangor Punta in which the ante was constantly being raised. The misstatements of Piper Management described in this Court's opinion in Chris-Craft Industries, Inc. v. Bangor Punta, Corp., supra, consisted of disparagements of the Chris-Craft offer and at least an implied maximization of the value of the Piper stock. Thus any rational person would have the right to assume and allege as a matter of pleading that the value of Piper stock was much higher than the Chris-Craft offer and that the Chris-Craft offer was inadequate. The Stull v. Greene complaints reflect this public posture of the Piper Management and the continued upping of the offers from January to May 1969. This Court itself in Chris-Craft Industries, Inc. v. Bangor Punta, 426 F. 2d at p.579, first reported in CCH Fed. Sec. L. Rep. Curr. Dec. at paragraph 92648, on May 6, 1970, described the effect of the competition for control of Piper on the price of the Piper stock. It is thus hard to see how any court can fault the plaintiff, at that stage in the public disclosure, for believing in good faith that the value of the stock was higher. The plaintiff would have the right to assume that "the exchange offer was receiving serious attention and approbation from larger and more knowledgeable investors" 426 F. 2d at p. 579. Thus when plaintiff alleged that the Piper stock was worth more than

$65.00 and was worth closer to $100.00 and that the $65. offer was "grossly and unconscionably inadequate" she was merely stating a reasonable conclusion from the fact that Piper management had stated that Piper stock was worth considerably more than the Chris-Craft offers which were raised from $65. to approximately $80. per share and from the competition between Chris-Craft and Bangor Punta for the stock.

In December 1971 the bad faith of Piper Management and the fairness of the Chris-Craft offers were brought to plaintiff's attorney's attention. It was at this stage and this stage only that plaintiff made allegations in Stull v. Pool that the Piper management had concealed the First Boston Corporation evaluation of the $65. offer as "fair and equitable" (480 F. 2d at p. 364) and deprived Piper shareholders from making reasonably informed investment decisions as to whether to tender to Chris-Craft, to Bangor Punta or to hold on to their shares.

In effect, the information disclosed by the Pollock decision rendered moot and in fact justified plaintiff in those allegations of Stull v. Greene, THERETOFORE MADE IN GOOD FAITH, that the $65. price was "unconscionably" inadequate, and rendered necessary the allegations in the Stull v. Pool complaint filed May 12, 1972 that the $65. price was in fact adequate and the

Piper Management had misled its shareholders.

There is no real contradiction. Each allegation was made at a time when the state of facts as disclosed to the plaintiff as a public shareholder of Piper required that it be cast in the format used by plaintiff.

The ruling of the District Court that plaintiff is an inadequate class representative because of the "scathing and contradictory allegations" should be reversed.

POINT VII

IN ORDER TO AVOID FURTHER APPEALS ON THE CLASS ACTION PROBLEM, THIS COURT SHOULD CONSIDER AND RULE ON THE INDICATION OF THE COURT BELOW THAT PLAINTIFF'S REPRESENTATION OF PIPER IN THE DERIVATIVE ACTION CONFLICTS WITH HER POSITION AS A CLASS REPRESENTATIVE. IN VIEW OF THE CHANGE OF THEORY MANDATED BY THE DISCLOSURE THAT PIPER MANAGEMENT HAD MISLED THE PUBLIC, THE CONFLICTS OF INTEREST WOULD BECOME MOOT.

At page 6 of the opinion, below, the District Court made the following statement:

> "Defendants assert that the conflict in this situation further mandates disqualification of Mrs. Stull as a class representative. Ruggiero v. American Bioculture Inc., 56 F.R.D. 93 (S.D.N.Y. 1972); Hawk Industries, Inc. v. Bausch & Lomb, Inc., 59 F.R.D. 619 (S.D.N.Y. 1973). This would seem to be a valid position but I do not reach this question." (202a)

The two cases cited by the District Judge announce the proposition that the same attorneys who represent a corporation derivatively may not also represent

a class which is suing the corporation.

We do not agree with the validity of this position. Similar actions involving both direct and derivative causes of action have been brought and upheld. See, for example, Saperstone v. Kapelow, 279 F.Supp. 781 (S.D.N.Y. 1968). In Northern Acceptance Trust 1065 v. Amfac, Inc., 51 F.R.D. 487 (D. Hawaii 1971), the Court specifically held that a class securities action under Rule 23 and a derivative action under Rule 23.1 could be maintained concurrently by the same named plaintiff.

The proper procedural mechanism for resolving any alleged issue as to conflict is not a Rule 23 motion. Any asserted conflicts should await Rule 56 proceedings or further proceedings when proof of conflict (if it should ever arise) can be shown. Herbst v. Able, 47 F.R.D. 11 (.S.D.N.Y. 1969); Arkansas Education Ass'n. v. Board of Education, 446 F. 2d 763 (8th Cir. 1971). Affidavits and supporting facts are more trustworthy arbiters of such alleged "clashes" than shifting verbal equations.

This Court considered the problem in Levine v. American Export, 473 F2d 1008 (2d Cir. 1973) and affirmed an order permitting lead counsel to act for both types of actions. The rationale expressed was that if a conflict of interest were to loom upon the horizon, appropriate

action could then be taken by the District Judge. This position was approved in In Re National Student Marketing Litigation, CCH Fed. Sec. L. Rep. §94,165; at p.94730 (.D.C.DC 1974).

In the instant case there is no conflict of interest. Stull v. Greene was based on the facts then open to the public and the plaintiff. Stull v. Pool is based on the completely changed set of facts now spread on the public record.

The plaintiff has now removed any possibility of any conflict of interest. The plaintiff has recognized that decisions of Judge Pollock in Chris-Craft v. Piper Aircraft Corp., supra, as affirmed in part and modified in part by this Court in Chris-Craft Industries,Inc. v. Bangor Punta Corp., supra, mooted most of the allegations of Stull v. Greene, which was based on the fundamental fact that the Chris-Craft offers were inadequate and the value of Piper stock much higher.

Chris-Craft Industries, Inc. v. Bangor Punta Corp. has announced that the Piper Management wilfully misled the Piper shareholders with knowledge that Piper's investment adviser had indicated that the Chris-Craft offer was fair and reasonable. Therefore plaintiff in her affidavit, sworn to January 30, 1974, stated that she was no longer making an affirmative claim against Piper

itself on the class action count. (178a - 184a). Her attorney's affidavit, sworn to January 30, 1974, made the following statement:

> "... It would appear that Piper Aircraft is no more than a nominal defendant in Stull v. Pool (class action) against whom no recovery will be sought." (182a)

This conclusion would have to follow because it has now been brought out that the Piper Management was making the false and misleading statements in their own individual interests, and not for any purpose which could remotely be deemed beneficial to Piper, and that they were among the joint tortfeasors against whom the class would have a claim and that the class would have no claim against Piper itself.

The factual basis for Stull v. Greene has to a large extent been rendered inapposite by the revelations in Judge Pollock's decision and by this Court's decision in Chris-Craft Industries v. Bangor Punta, 480 F. 2d 341. Thus by amendment of Stull v. Greene to reflect the changed facts, plaintiff will press for recovery for Piper of the damages caused by the machinations of Piper Management in their attempts to retain personal control of Piper. Such damages would include legal, accounting, public relations and other expenses, delisting from the New York Stock Exchange, damage to Piper's image, claims against Piper Management for trading in its stock and other items.

Plaintiff plans to withdraw Stull v. Pool against Piper and continue it against the other defendants.

The drastic change in the basic facts - - - that Piper Management had falsely stated that the Chris Craft offers were inadequate . . . has rendered Stull v. Greene inapposite in its present posture.

All this negates the defendants' argument that there is any conflict which would mandate plaintiff's disqualification as a class representative. The consolidated actions will be confined to a derivative claim based on damages to Piper caused by the Piper Management's unlawful conduct in trying to perpetuate their personal control against the Chris-Craft offer and Stull v. Pool will be a class claim against the Piper management and not against Piper. Plaintiff is not serving two master. There is and will be no conflict of interest.

CONCLUSION

The failure by this Court to accept appellate jurisdiction over the ruling of the Court below will spawn the following anomalies:

1. Defendants who are adjudicated violators of Federal Securities laws will have been able to urge the Court to rule that the plaintiff is subject to a conflict of interest vis-a-vis the class, which will insulate the

wrongdoers from liability to the class for their wrongdoings.

2. The plaintiff, who was the only public investor who has shown enough interest in the class to be willing to champion the class, will have been blocked from representing the class because of a remote possibility of conflict of interest. Only the interest of those defendants who wilfully damaged the class will be served.

3. The provisions of Rule 23, F.R.C.P., regarding notice and the right to opt out, were designed to prevent one way intervention; i.e., the class members jumping on the bandwagon after judgment has been rendered for the plaintiffs in the old Rule 23 spurious class action. Requiring plaintiff to proceed with the suit and if successful to appeal from the "interlocutory" denial of class determination will promote exactly the one-way intervention that the Rule was designed to obviate.

4. Declared national and New York State policy in favor of equal economic and other status for women is negated by a ruling which implies that the wife may not press the rights of the class because her attorney is also her husband and she will not exercise independent judgment as a class representative.

5. Class representation is being denied because of a claimed potential breach of trust which may not occur and which the Court's supervisory powers over class settlements and class attorney's fees will squelch if it does

occur.

6. The declared policy of this Circuit in favor of class securities actions is subverted and eroded by archaic decisional law on class actions in this District and other districts and the unavailability of immediate appeal. The policy in favor of finality should be relaxed to provide appellate guidelines which will serve to reduce the excessive time and attention devoted by courts and attorneys to ad hoc determination of motions to determine class status.

THIS COURT SHOULD TAKE JURISDICTION OF THIS APPEAL AND REVERSE THE DECISION AND ORDER OF THE DISTRICT COURT.

Respectfully submitted,

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